



ARKANSAS JUDICIARY

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## Rule 37. Failure To Make Discovery; Sanctions.

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to all parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the place where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the place where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested, or fails to permit inspection as requested, or if a party, in response to a request under Rule 35(c), fails to provide an appropriate medical authorization, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion shall include a statement that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(3) Evasive or Incomplete Answer or Response. For purposes of this subdivision, an evasive or incomplete answer or response is to be treated as a failure to answer or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them, to pay to the moving party the reasonable expenses incurred in making the motion, including attorneys' fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's response or objection was substantially justified or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a

just manner.

(b) Failure to Comply with Order.

(1) Sanctions By Court In Place Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the place in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions By Court In Which Action Is Pending. If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B) and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party, or an officer, director or managing agent of a party or person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party, fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a statement that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or

response without court action. In lieu of any other order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in Rule 26(c).

(e) Failure to Supplement Responses. If a party fails to supplement responses seasonably as required by Rule 26(e), and another party suffers prejudice, then upon motion of the prejudiced party made before or at trial, the court may make any order which justice requires to protect the moving party, including but not limited to imposing any sanction allowed by subdivision (b)(2)(A)-(C) of this rule.

(f) Expenses Against State. Except to the extent permitted by statute, expenses and fees may not be awarded against the state of Arkansas under this rule.

Reporter's Notes to Rule 37: - 1. With the exception of minor wording changes and the omission of Section (e) of FRCP 37, this rule [is] identical in substance to the Federal Rule. Prior Arkansas law was found in Ark. Stat. Ann. 28-359 (Repl. 1962) which tracked the Federal Rule prior to its 1970 amendments.

2. As under prior Arkansas law, the imposition of sanctions for failure to make discovery rests in the discretion of the trial court. *Diaz v. Southern Drilling Co.*, 427 F. 2d 1118 (C.C.A. 5th, 1970); *Marshall v. Ford Motor Company*, 446 F. 2d 712 (C.C.A. 10th, 1971). Overall, this rule should not effect any significant changes in Arkansas practice.

Addition to Reporter's Notes, 1997 Amendment: - The major change in this rule appears in paragraph (2) of subdivision (a) and corresponds to an amendment to Rule 26(c). Under paragraph (2), a party moving to compel discovery must state in the motion, subject to Rule II, that it has attempted to resolve the dispute informally before seeking judicial intervention. Another change corresponds to an amendment to Rule 35(c) establishing a 30-day deadline for responding to a request for authorization to obtain medical records. As amended, paragraph (2) provides for a motion to compel if the authorization is not provided in a timely manner. In addition, the last sentence of paragraph (2) has been moved to paragraph (4).

Under revised paragraph (3) of subdivision (a), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for inspection should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions.

Paragraph (4) of subdivision (a) has been divided into three subparagraphs for ease of reference, and in each the phrase "after opportunity for hearing" has been changed to "after affording an opportunity to be heard" to make clear that the court can consider such questions on written submissions as well as on oral hearings. Subparagraph (A) has been revised to cover the situation in which information that should have been produced without a motion to compel is produced after the motion is filed but before a hearing. It also provides that a party should not be awarded expenses for filing a motion that could have been avoided by conferring with opposing counsel. Subparagraph (C) has been amended to include the provision formerly contained in subdivision (a)(2) with respect to protective orders and to

include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Under revised subdivision (d), a party seeking discovery via interrogatory or inspection request must make an effort to obtain responses before filing a motion for sanctions. Similar requirements to attempt resolution of discovery disputes without court action appear in revised Rules 26(c) and 37(a)(2).

Addition to Reporter's Notes, 2003 Amendment: - In subdivision (b)(2), the word "person" in the first clause has been replaced with "party," thus making the provision consistent with the corresponding federal rule.

Addition to Reporter's Notes, 2006 Amendment: - The Rule has been amended by adding a new subdivision (e) and renumbering former subdivision (e) as (f). New subdivision (e) draws on the principles embodied in the 2000 amendment to Federal Rule of Civil Procedure 37, but establishes a different rule. Under this new Arkansas Rule, when a party fails to supplement discovery responses seasonably with new information, and prejudice results, then the prejudiced party may move the circuit court for relief. New subdivision (e) gives the circuit court wide discretion, including imposing any sanction allowed by Arkansas Rule of Civil Procedure 37, in handling any failure to supplement. This new provision works in tandem with the companion change in Arkansas Rule of Civil Procedure 26(e) to strengthen every party's duty to supplement discovery responses promptly.

### **History Text:**

History. Amended November 18, 1996, effective March 1, 1997; amended January 13, 1997, effective March 1, 1997; amended March 13, 2003; amended May 25, 2006

### **Associated Court Rules:**

Rules of Civil Procedure

### **Group Title:**

V. Depositions and Discovery

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